

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 134

PARAGON JEWEL COAL COMPANY, INC., PETITIONER
v.

COMMISSIONER OF INTERNAL REVENUE

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner holds mineral leases on coal-bearing lands in Virginia. It entered into oral contracts with several individuals and partnerships for the removal of the coal. Under the terms of the contracts the individuals and partnerships were to mine coal and deliver it to petitioner's tipple in return for a per-ton price established from time to time by petitioner. Petitioner then sold the coal on the open market. As a lessee, petitioner was entitled to percentage depletion on its "gross income from the property." Section 613 of the Internal Revenue Code of 1954. The question here is whether petitioner was entitled to

(1)

include as "gross income from the property" the amount it received but paid to the contract miners for their services. This issue, in turn, depends on whether the miners acquired "economic interests" in the coal in place under their contracts with petitioner. If so, the amounts received by the miners constituted their own "gross income from the property" and were depletable by them, and not by petitioner. *Parsons v. Smith*, 359 U.S. 215.

The Commissioner denied depletion to both petitioner and the miners on the amounts paid to the miners, and both parties petitioned the Tax Court for review of the resulting deficiencies. In the Tax Court proceedings, the government conceded that either petitioner or the contract miners, but not both, could take depletion deductions on the amounts paid to the miners. After hearing conflicting evidence on the contract terms, the Tax Court held that the oral agreements between the parties did not give the contract miners an "economic interest" in the coal in place so as to entitle them to depletion, and allowed depletion deductions to petitioner only. In the court of appeals, the government supported the Tax Court's decision. The court of appeals reversed the Tax Court and directed the entry of judgment against petitioner and in favor of the contract miners.

Parsons v. Smith, *supra*, presented the same issue on substantially similar facts. In the present case, the Tax Court found that the oral contracts created a relationship between the parties that was indistinguishable from those in *Parsons*. The Fourth Cir-

cuit distinguished *Parsons* on the ground that in this case the contract miners had a right to mine a specific area to exhaustion. In so doing, it followed the pattern of its earlier decision in *Elm Development Co. v. Commissioner*, 315 F. 2d 488, in which it also distinguished *Parsons* because of the absence of a contract right to terminate the relationship on short notice.

We believe that the decision of the court of appeals is basically in conflict with *Parsons*. However, we do not think that the issue is of sufficient importance at this time to require this Court to consider the present case. Other courts are likely to follow *Parsons* rather than the decision here, so that the present case will have precedential value only in the Fourth Circuit. Moreover, since *Parsons* demonstrated the wisdom of a written contract clearly defining the agreement of the parties, the issue presented in that case and in this one is likely to arise only in cases involving agreements made prior to *Parsons* or without the benefit of tax counsel.* Finally, with the decision in *Parsons* having been so recently announced, there seems little reason to believe that this Court's application of its principles to the particular facts of this case would add significantly to a clarification of the law in this difficult area. On balance, and despite the clear error of the decision below, we believe it appropriate for the Court to await further developments before undertaking another review of this question. It is sub-

**Dotson v. United States*, No. 23-62, pending in the Court of Claims, raises the same issue. The taxpayers there are contract miners under oral contracts.

4
mitted, accordingly, that the petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

MELVA M. GRANNEY,
MICHAEL MULRONEY,
Attorneys.

JULY 1964.